

The Honorable Judge Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

10 UNITED STATES OF AMERICA, )  
11 Plaintiff, ) Cause No. No. CR04-334RSM  
12 v. )  
13 KYLE GIANIS, ) **Defendant's Reply Regarding Motion**  
14 Defendant. ) **for New Trial**  
\_\_\_\_\_  
)

Comes now the defendant and replies to the government's response to defense motion for new trial and responds as follows:

The government makes two arguments in support of its opposition to defendant's motion for new trial. First, the government argues it never referred to defendant's failure to testify either explicitly or by implication. Second, the government argues that even if its closing argument was improper, it was not prejudicial. Third, the government goes to great length to try to justify its closing argument reference to Kyle Gianis' legal rights by suggesting that there was something improper in the manner in which defense counsel cross examined witness Tsoukalas.

## The Cross Examination of Tsoukalas did Not Invite a Reference to Mr. Gianis' Legal Rights.

Defense counsel questioned witness Tsoukalas regarding a sworn statement that he gave to a government investigator on the night of his arrest. Specifically, defense counsel questioned Tsoukalas about his failure to answer two specific questions: Tsoukalas was asked, "When did you know that there

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1 was ephedrine in the car?" Answer: "I can't answer that." Tsoukalas was also asked, "Do you know  
 2 who put the ephedrine in the trunk of the car?" Answer: "No answer." It was not until five questions  
 3 later that Tsoukalas indicated he wanted to talk to a lawyer first before answering any more questions.  
 4 Defense counsel did not seek to question Tsoukalas at all about his request for an attorney, his exercise  
 5 of his right to remain silent or his responses to any questions he was asked after he was requested an  
 6 attorney.

7       The government used Tsoukalas' exercise of his right to remain silent and his right to an attorney  
 8 to highlight Kyle Gianis' exercise of those same rights. Tsoukalas, however, was a witness and suffered  
 9 no prejudice from his exercise of his right to remain silent or right to retain an attorney. Kyle Gianis on  
 10 the other hand was a trial defendant and reference to his exercise of his 5<sup>th</sup> Amendment and 6<sup>th</sup>  
 11 Amendment rights directly prejudiced him.

12       In attempting to impugn the defense cross examination of witness Tsoukalas, the government  
 13 ignores the fact that defense counsel's attack of Tsoukalas' credibility was well founded. Witness  
 14 Youngberg testified that he specifically was told by witness Tsoukalas to make up a story Kyle Gianis  
 15 having borrowed Youngberg's car. In addition, during the sworn statement of Tsoukalas which defense  
 16 counsel was focusing on during cross examination of Tsoukalas, defense counsel first pointed out that  
 17 Tsoukalas originally answered that he was just going to the Bellsfair Mall to go shopping.

18 Whether or not the Government Actually "Intended" to Comment on Defendant's Failure to Testify or  
his Retention of an Attorney, the Comments were Improper.

19       As the government points out, in Griffin v. California, 38 U.S. 609, 615 (1965) an indirect  
 20 comment on the defendant's failure to testify violates Griffin, not only if it is intended to call attention  
 21 to a defendant's failure to testify, but also if it is "of such a character that the jury would naturally and  
 22 necessarily take it to be a comment on the failure to testify." Hovey v. Ayers, 458 F3d 892, 912 (9<sup>th</sup> Cir.  
 23 2006).

24       The government's argument that it was entitled in rebuttal to point out that Tsoukalas had a  
 25 constitutional right to remain silent misses the point. The government could have made this point without  
 26

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1 reference to Kyle Gianis. Instead, the government chose to deliberately make reference to Kyle Gianis'  
 2 legal rights. Proper rebuttal would have been to indicate to the jury that Adam Tsoukalas exercised his  
 3 right to remain silent. The government crossed the line when it specifically referenced by name Kyle  
 4 Gianis.

5 This case is distinguishable from United States v. Soulard, 730 F.2d 1292 (9<sup>th</sup> Cir. 1984) cited by  
 6 the government. Soulard involved a government reference to the defense failing to put on "any  
 7 evidence." In Soulard, the court pointed out that while a prosecutor may properly comment upon  
 8 defendant's failure to present exculpatory evidence as long as it is not phrased to call attention to the  
 9 defendant's own failure to testify. United States v. Passaro, 624 F.2d 938, 944 (9<sup>th</sup> Cir. 1980), *cert.*  
 10 *denied*, 449 U.S. 1113 (1981).

11 Contrary to the government's position, even indirect references on the failure to testify can violate  
 12 the 5<sup>th</sup> Amendment privilege. A reviewing court must look at all of the surrounding circumstances in  
 13 determining whether or not there has been a constitutional violation. Butler v. Rose, 686 F.2d 1163,  
 14 1170 (6<sup>th</sup> Cir. 1982). A prosecutor's comment does not need to be direct, rather, a prosecutor may run  
 15 afoul of the rule in Griffin by making such comments inferentially. See, Glantz v. United States, 810 F.2d  
 16 316, 322 (1<sup>st</sup> Cir. 1987).

17 The government misses the import of the comments it made during its closing argument in this  
 18 case. Those comments went not only to defendant's right to remain silent, but also to defendant's right  
 19 to an attorney. The government's comparison of Mr. Gianis to Mr. Tsoukalas in terms of having the  
 20 same rights was simply a clever way of pointing out that Mr. Gianis had exercised his own right to remain  
 21 silent and had retained an attorney just as Mr. Tsoukalas had.

22 The Prosecutor's Comments were Prejudicial.

23 Despite the Court's instruction to the jury to disregard the prosecutor's comments, in the context  
 24 of this case, the comments were prejudicial.

25 The government in its responsive pleading does not argue nor can it properly argue that it had an  
 26 overwhelming case against the defendant. This was a very close case. The government's case rested

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1 heavily on the credibility of its two cooperating witnesses as there were no neutral witnesses to support  
2 the government's contentions nor was there any forensic evidence nor any admissible statements by the  
3 defendant. Given the limited evidence that the government had to support its case, any improper  
4 comments about the exercise of the right to counsel or the right to silence would have been prejudicial.  
5 Thus, the even indirect reference to two of Kyle Gianis' fundamental constitutional rights – to remain  
6 silent and to retain counsel – unfairly infringed upon Kyle Gianis' exercise of his rights to the point of  
7 prejudice.

8 DATED this 24<sup>th</sup> day of June, 2008.

9 Respectfully submitted,

10 /s/ Peter A. Camiel

11 Peter A. Camiel, WSBA #12596

12 Attorney for Kyle Gianis

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2                   CERTIFICATE OF SERVICE  
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5                   I hereby certify that on June 24, 2008 I electronically filed the foregoing with the Clerk of the  
6 Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record  
for the defendant(s) and plaintiff.

7  
8                   \_\_\_\_\_/s/ Peter A. Camiel, WSBA #12596  
9                   Attorney for Kyle Gianis  
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